SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 904

MAYHUE'S SUPER LIQUOR STORES, INC.,
Appellant,

vs.

DON MEIKLEJOHN, as Director, Beverage Department, State of Florida, et al.,
Appellees.

APPEAL PURSUANT TO §1253, TITLE 28, UNITED STATES CODE, FROM THREE JUDGE PANEL, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

MAYHUE'S SUPER LIQUOR STORES, INC.,
Appellant,

vs.

DON MEIKLEJOHN, as Director, Beverage Department, State of Florida, et al.,
Appellees.

APPEAL PURSUANT TO §1253, TITLE 28, UNITED STATES CODE, FROM THREE JUDGE PANEL, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

The Plaintiff, MAYHUE'S SUPER LIQUOR STORES, INC., has appealed, pursuant to §1253, Title 28, United States Code, from an order of a three judge District Court for the Southern District of Florida, dismissing its complaint which sought an injunction, as unconstitutionally contrary to the Fourteenth Amendment, against the enforcement of the provisions of Statutes of the State of Florida against it.

REFERENCE TO OPINIONS BELOW

The order of the three judge panel of the United States District Court for the Southern District of Florida, herein sought to be reviewed (R. 73), and dated October 9, 1968, is unreported and is printed in Appendix "A" hereto. An earlier order of a single District Judge (R. 67-68), denying motions to dismiss the cause and suggesting the convening of a three judge panel pursuant to 28 United States Code, §2281, is unreported and is printed in Appendix "B" hereto.

GROUNDS OF INVOCATION OF JURISDICTION OF COURT

The jurisdiction of this Court is invoked upon the following bases:

1. This action was commenced by the filing in the United States District Court for the Southern District of Florida of a complaint by the Plaintiff, MAYHUE'S SUPER LIQUOR STORES, INC., against HONORABLE DON MEIKLEJOHN, as Director, Beverage Department, State of Florida, seeking an injunction against the enforcement of provisions of Florida Statutes, §561.42 and §562.21, on the ground that the provisions were unconstitutional as contrary to the equal protection and due process clauses of the United States Constitution. Jurisdiction was invoked under Title 28, United States Code, §1331, as an action arising under the Constitution of the United States and involving the jurisdictional amount. Declaratory relief was sought under the provisions of Title 28, United States Code, §§2201 and 2202. A three judge District Court was convened pursuant to the provisions of Title 28, United States Code, §2281.

2. The judgment sought to be reviewed herein was entered at 10:13 A.M., October 9, 1968. There was no petition for rehearing or order relating thereto. A notice of appeal directed to this Court was duly filed in the United States District Court for the Southern District of Florida on November 6, 1968.

3. The jurisdiction of this Court on appeal is invoked pursuant to Title 28, United States Code, §1253.

4. Among the cases which sustain the jurisdiction of this Court are: *Florida Lime & Avocado Groves, Inc.* v. *Jacobson*, 362 U.S. 73 (1959); *Paul* v. *United States*, 371 U.S. 245 (1963); *Brotherhood of Locomotive Engineers* v. *Chicago R.I. & P.R. Co.*, 382 U.S. 423 (1966).

5. The validity of Florida Statutes, §561.42, 2 Fla. Stat. 2729-2731 (1957) and §562.21, 2 Fla.Stat. 2743 (1957), are involved herein. Since the provisions thereof are lengthy, the text is set out in Appendix "C" hereto

QUESTION PRESENTED BY APPEAL

Whether the three judge Court properly dismissed the complaint upon the ground that the plaintiff's challenge of provisions of the Florida "Tied House Evil" liquor statutes, Florida Statutes, §§561.42 and 562.21 on equal protection and due process grounds, presented no substantial federal question.

STATEMENT OF THE CASE

The plaintiff, MAYHUE'S SUPER LIQUOR STORES, INC., is the operator of a package liquor store in Broward County, Florida. As such, it is subject to the provisions of Florida Statutes relating to its purchase from wholesalers and distributors of its merchandise—beer, wine and

other liquor. Among these provisions are those contained in Florida Statutes, §561.42, 2 Fla.Stat. 2729-2731 (1967) commonly referred to as the "Tied House Evil" statute, which inter alia, prohibits the use of credit for the sale of liquor beyond a period including the tenth day after the calendar week within which such a sale is made; and Florida Statutes, §562.21, 2 Fla.Stat. 2743 (1967) which prohibits any sale of beer or wine to a liquor vendor *on any basis other than cash.* These provisions of the Florida Statutes, which were purportedly enacted, see *Pickerill v. Schott,* Fla. 1951, 55 So.2d 716, certiorari denied, 344 U.S. 815 (1952) (a) as a temperance measure to reduce the flow of alcoholic beverages to the public, and (b) to preclude the domination by liquor manufacturers of retail outlets, do not apply to any business other than that involving alcoholic beverages and, within that industry, apply only to credit sales to retail vendors. They do not purport to regulate sales between manufacturers and wholesalers or distributors.

Mayhue's brought an action in the Southern District of Florida against the Director of the State of Florida Beverage Department, who is charged with the enforcement of these provisions. The complaint, based upon federal question jurisdiction and the declaratory judgment statutes (R. 1), alleged that the statutes in question created unjustified classifications between *retail vendors* of liquor and others in the industry, between the liquor industry itself and other pursuits and as to the treatment of beer-and-wine and hard liquor sales within the industry itself. It complained that the statutory regulation contained in the statutes on credit sales was inconsistent, arbitrary and capricious, and bore no reasonable relation to the public health, safety and general welfare (R. 6). Claiming that the statutes deprived the plaintiff of equal

protection and due process as guaranteed by the Fourteenth Amendment to the United States Constitution[1] the complaint sought an injunction against the Beverage Director from enforcing the statutes (R. 7).

The Director moved to dismiss the complaint on several grounds (R. 13-19) and two industry representatives, DISTILLED SPIRITS WHOLESALERS, INC. and BEER INDUSTRY OF FLORIDA[2] moved for leave to intervene as party defendants and joined in the defendant's motions to dismiss (R. 41-42, 48-51). The motions to intervene were never ruled upon but the liquor representatives were permitted to participate in the proceedings below as amici curiae, supporting the position of the defendant (See R. 57-58).

Soon thereafter, the plaintiff applied, pursuant to 28 United States Code, §2281, for the empanelling of a three judge court (R. 54). After argument, the United States District Judge denied the defendant's jurisdictional motions and suggested that the three judge District Court be empanelled to rule upon the merits of the plaintiff's challenge to the statutes in question (R. 67-68). After the cause was transferred to the docket of another District Judge, the three judge panel was in fact convened by order of Chief Judge Brown of the Fifth Circuit (R. 70). The three judge panel then held oral argument upon the pending motions to dismiss the complaint on the merits. After argument of counsel (R. 81-157) during which counsel for the plaintiff advanced the contentions that the challenged statutes were unconstitutional under the Four-

1. The Fifth Amendment was also referred to but is not relied upon here.

2. The complaint alleged that the challenged statutes served only the interests of liquor wholesalers and distributors and that the State Beverage Department in effect acted as a private collection agency against retail vendors on their behalf. (R. 6).

teenth Amendment as involving unlawful classifications, without basis in the purposes sought to be achieved by the statute, and resulting in a due process deprivation, the three judge panel entered the order appealed from, dismissing the complaint on the ground that it affirmatively appeared "from the allegations of the complaint and the oral argument of counsel that there is no substantial federal question presented for determination by this Court . . ." (R. 73). This appeal followed.

REASONS FOR NOTING PROBABLE JURISDICTION

The question presented requires plenary consideration by this Court since the order on appeal has determined, without the taking of testimony, that no substantial federal question was presented by the plaintiff. In view of the substantial contentions of the plaintiff that the intra-industry and inter-industry classifications created by the statute are not based upon differences reasonably related to the said purposes of the statute, the determination below is in conflict with the plaintiff's right to establish factually the basis of those assertions which, under, e.g., *Smith* v. *Cahoon*, 283 U.S. 553 (1930) and *Morey* v. *Doud*, 354 U.S. 457 (1957) would render the challenged statutes unconstitutionally contrary to the equal protection and due process clauses of the Fourteenth Amendment.

While issues similar to those raised here have been determined by several state courts of last resort, they have never been determined by this Court. The statutes involved here are similar to those in several other states. They affect a multi-million dollar industry and the rights of many persons and entities engaged in that industry. The question of the sufficiency of the plaintiff's challenge to require a hearing on the merits is itself so important as to require consideration by this Court.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DANIEL S. PEARSON
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ROBERT C. JOSEFSBERG
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Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Jurisdictional Statement has been mailed to: W. R. PHILLIPS, ESQ., Carlton Building, Tallahassee, Florida, Attorney for State Beverage Department; FRATES, FAY, FLOYD & PEARSON, ESQS., Twelfth Floor, Concord Building, Miami, Florida 33130, Attorneys for Distilled Spirits Wholesalers, Inc.; and to: SCOTT, McCARTHY, STEEL, HECTOR & DAVIS, ESQS., 1414 First National Bank Building, Miami, Florida 33131, Attorneys for Beer Industry of Florida, this 3rd day of January, 1969.

.....
DANIEL S. PEARSON

APPENDIX "A"

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 67-963-Civil-JE

MAYHUE'S SUPER LIQUOR STORES, INC.,

Plaintiff,

vs.

DON MEIKLEJOHN, as Director, Beverage Department, State of Florida, et al.,

Defendants.

Order

Before DYER, Circuit Judge, and CABOT and EATON, District Judges.

PER CURIAM:

It affirmatively appearing from the allegations of the complaint and the oral argument of counsel for the respective parties that there is no substantial federal question presented for determination by this court, the complaint is

DISMISSED.

APPENDIX "B"

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 67-963-Civ-CF

MAYHUE'S SUPER LIQUOR STORES, INC.,

Plaintiff,

vs.

DON MEIKLEJOHN, as Director, Beverage Department, State of Florida, et al.,

Defendants.

Order

The Plaintiff, who claims to be a retail vendor of liquor, wine and beer, instituted this action against DON MEIKLEJOHN, as Director of the Beverage Department of the State of Florida, claiming that Sections 561.42 and 561.21 of the Florida Statutes are unconstitutional and seeking a temporary and permanent injunction against said Director from enforcing said laws. The sections under attack are generally known as the "Tied House Evil" Statutes, which have for their purpose prohibiting a manufacturer or distributor of alcoholic beverages from having a financial interest in the business of a retailer of alcoholic beverages and forbidding manufacturers or distributors from assisting such retailers by any gift or loan of money or otherwise.

Certain wholesaler—distributor interests were permitted as amici curiae to participate in motions to dismiss which were presented to and strenuously argued before the Court. In support of these motions it was strenuously contended that this Court does not have jurisdiction to

consider and determine this cause because of the absence of a justiciable issue, and for other reasons. It was likewise argued that it would be improper to empanel a three-judge District Court to hear and determine this cause and that if such Court were constituted, that it would also be without jurisdiction of the subject matter of this cause.

This Court is of the opinion that it does have jurisdiction and that a three-judge District Court should be constituted; and that to the extent that the motions to dismiss challenge jurisdiction, the same should be denied. Thereupon, it is,

ORDERED and ADJUDGED as follows:

1. That to the extent that said motions to dismiss challenge the jurisdiction of this Court, the same should be and are hereby severally denied.

2. That a District Court of three Judges in accordance with 28 U.S.C. §2281 should be constituted to inquire into and determine the validity of the Florida Statutes which are challenged and to consider and resolve the prayer of the Complaint which seeks injunctive relief.

DONE and ORDERED at Miami, Florida, this 15th day of July, 1968.

Charles B. Fulton
Chief Judge

cc: Pearson & Josefsberg, Attorneys for Plaintiff
Frates, Fay, Floyd & Pearson, Attorneys for Def. Distilled Spirits

Scott, McCarthy, Steel, et al. and Thomas F. Woods, Esq., Attorneys for Beer Industry of Florida

W. R. Phillips, Esq., Attorney for State Beverage Department

APPENDIX "C"

Provisions of Florida Statutes involved:

561.42 Tied house evil; financial aid and assistance to vendor by manufacturer or distributor prohibited; procedure for enforcement; exception

(1) No licensed manufacturer, or distributor, of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the beverage law, nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed manufacturer or distributor; provided, however, that this shall not apply to any bottles, barrels or other containers necessary for the legitimate transportation of such beverages, or advertising materials, and shall not apply to the extension of credit, for liquors sold, made strictly in compliance with the provisions of this section.

(2) Credit for the sale of liquors may be extended to any vendor up to but not including the tenth day after the calendar week within which such sale was made.

(3) In cases where payment for sales to a vendor is not made by the tenth day succeeding the calendar week in which such sale was made, the distributor who made such sale shall, within three days, notify the beverage department in writing of such fact and the beverage department, upon receipt of such notice, shall, after compliance with the proceedings hereinafter mentioned, declare in writing to such vendor and to all manufacturers and dis-

tributors within the state that all further sales to such vendor are prohibited until such time as the beverage department shall certify in writing that such vendor has fully paid for all liquors previously purchased.

(4) Before the beverage department shall so declare, and prohibit such sales to such vendor, it shall, within two days after receipt of such notice, give written notice to such vendor by mail of the receipt by the beverage department of such notification of delinquency and such vendor shall be directed to forthwith make payment thereof, or upon failure to do so, to show cause before the beverage director or one of his designated assistants why further sales to such vendor shall not be prohibited. Good and sufficient cause to prevent such action by the beverage department may be made by showing payment, failure of consideration, or any other defense which would be considered sufficient in a common law action. The vendor shall have five days after receipt of such notice within which to show such cause, and he may demand a hearing thereon, provided he does so in writing within said five days, such written demand to be delivered to the beverage director either in person or by due course of mail within such five days. If no such demand for hearing be made, the beverage department shall thereupon declare in writing to such vendor and to all manufacturers and distributors within the state that all further sales to such vendor are prohibited until such time as the beverage department shall certify in writing that such vendor has fully paid for all liquors previously purchased. If such demand for hearing is made, the vendor shall be entitled to produce witnesses and be represented by counsel. Decision thereon may be made by the director or such designated assistant who has heard the same. In the event no good cause be shown, such prohibition of sales and declaration thereof to the vendor, manufacturers and distributors shall follow five

days after such hearing unless the vendor within such time seeks review of such decision by certiorari or any other appropriate remedy to the circuit court of the county wherein the vendor is licensed to do business under the beverage law. In the event application for such review is filed within such time, such prohibition of sales shall not be made, published or declared until final disposition of such review by the courts.

(5) Upon receipt by the beverage department from the distributor of the notice of nonpayment provided for by subsection (3), above, the beverage department shall forthwith notify such delinquent vendor and all distributors in the state that no further purchases or sales of liquor by or to such vendor, except for cash, shall be made until good cause be shown by such vendor as heretofore provided for. No liquor shall be purchased by such vendor or sold to him by any distributor, except for cash, from and after such notification by the beverage department and until such cause be shown as is provided for in subsection (4), next above. In the event no good cause be shown, then all further sales, for cash or credit are hereby prohibited after such declaration in writing by the beverage department is sent to such vendor and distributors and until all delinquent accounts have been paid..

(6) Nothing herein shall be taken to forbid the giving of trade discounts in the usual course of business upon wine and liquor sales.

(7) The extension or receiving of credits in violation of this section shall be considered as an arrangement for financial assistance and shall constitute a violation of the beverage act and any maneuver, shift or device of any kind by which credit is extended contrary to the provisions of this section shall be considered a violation of the beverage act.

(8) The director may establish rules and require reports to enforce the herein established limitation upon credits and other forms of assistance. Nothing herein shall be taken to affect the provisions for cash sales of wines or beer as are provided in § 562.21 or provisions of § 562.22 but shall govern all other sales of intoxicating liquors.

(9) The term advertising materials as used in this section shall not include outside signs so located as to be connected with or appertaining to the vendor's licensed premises.

(10) No manufacturer or distributor of the beverages herein referred to shall directly or indirectly give, lend, rent, sell or in any other manner furnish to a vendor any outside sign, printed, painted, electric, or otherwise; nor shall any vendor display any sign advertising any brand of alcoholic beverages on the outside of his licensed premises or on any lot of ground of which the licensed premises are situate, or on any building of which the licensed premises are a part.

(11) A vendor may display in the interior of his licensed premises, including the window or windows thereof, neon, electric, or other signs, including window painting and decalcomanias applied to the surface of the interior or exterior of such windows, and posters, placards, and other advertising material advertising the brand or brands of alcoholic beverages sold by him, whether visible or not from the outside of the licensed premises, but no vendor shall display in the window or windows of his licensed premises more than one neon, electric, or similar sign, advertising the produce of any one manufacturer.

(12) Any manufacturer or distributor may give, lend, furnish, or sell to a vendor who sells the products of such

manufacturer or distributor neon or electric signs, window painting and decalcomanias, posters, placards and other advertising material herein authorized to be used or displayed by the vendor in the interior of his licensed premises.

2 Fla. Stat. 2729-2731 (1967).

562.21 Sale of beer and wine to vendors for cash only

All sales of malt, brewed or vinous beverages as defined in the beverage law, made by manufacturers, when distributing under a manufacturer's license, wholesalers and distributors to retail licensees must be for cash only, and cash in this instance means that delivery and payment therefor is to be a simultaneous transaction and any maneuver, device or shift of any kind whereby credit is extended shall constitute a violation of the beverage law. Nothing herein shall be construed to permit such manufacturers to distribute to vendors under a manufacturer's license where a warehouse has been established in any county or counties from which such beverages are distributed other than the county wherein they are licensed to so manufacture.

2 Fla. Stat. 2743 (1967).

IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1968

No. 904

MAYHUE'S SUPER LIQUOR STORES, INC.,
Appellant,

vs.

DON MEIKLEJOHN, as Director,
Beverage Department, State of Florida, et al.,
Appellees.

Appeal Pursuant to § 1253, Title 28, United States Code, from Three Judge Panel, United States District Court for the Southern District of Florida

---

Appellees' Motion to Dismiss the Appeal or Affirm the Judgment Below Pursuant to Supreme Court Rule 16

and

BRIEF IN SUPPORT THEREOF

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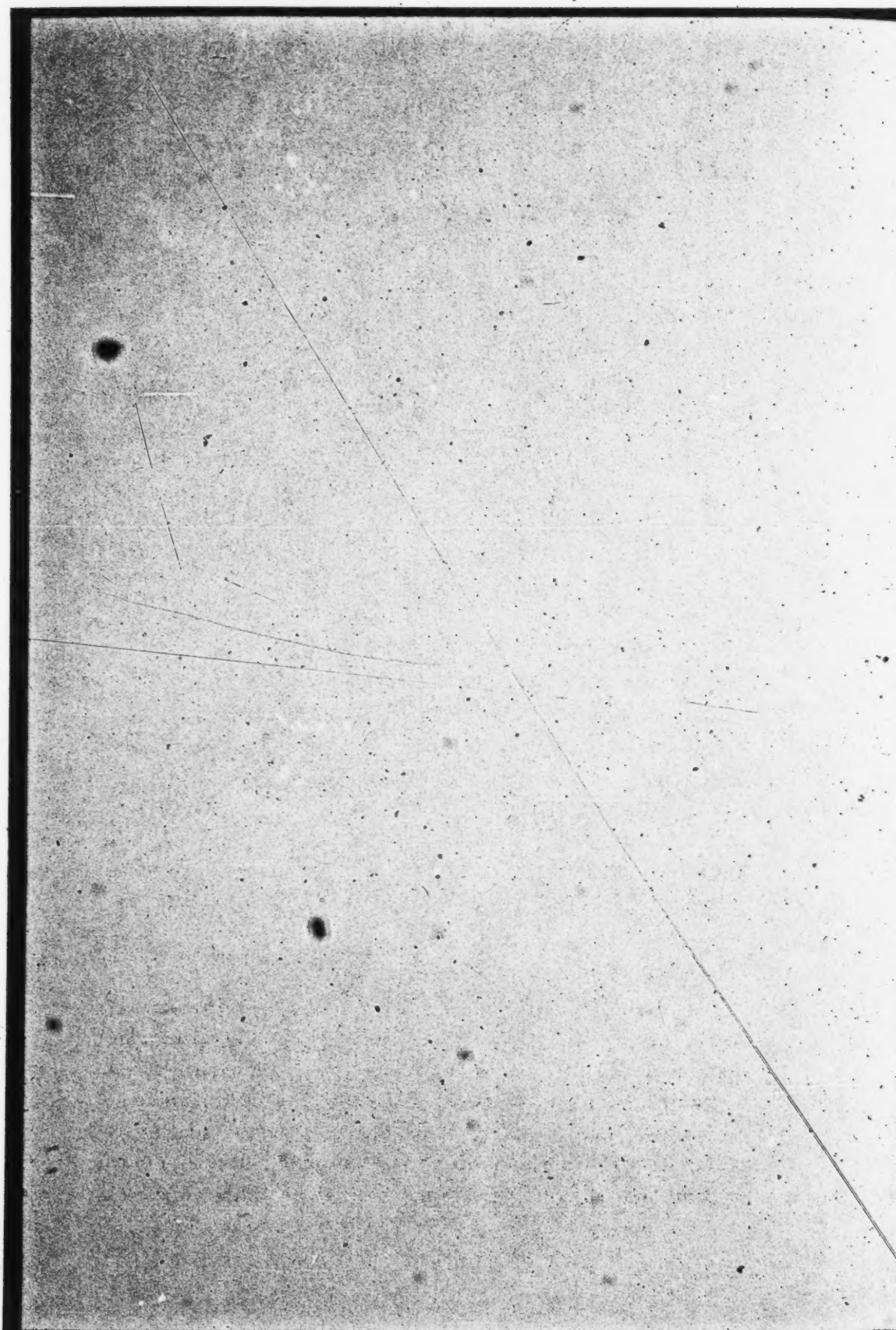

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Appeal Pursuant to § 1253, Title 28, United States Code, from Three Judge Panel, United States District Court for the Southern District of Florida

---

Appellees' Motion to Dismiss the Appeal or Affirm the Judgment Below Pursuant to Supreme Court Rule 16

Defendant-Appellee, DON MEIKLEJOHN, as Director of the Beverage Department of the State of Florida, moves to dismiss the Appeal herein pursuant to Supreme Court Rule 16 on the ground that the appeal is not within the jurisdiction of this Court and in the alternative moves to affirm the Order of Dismissal below upon the ground that it is manifest that the three-judge court was

correct in dismissing the cause for lack of a substantial federal question so as not to need further argument.

This motion is supported by a brief, filed and served with the motion.

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W. R. Phillips
Attorney for Florida State Beverage Department
Carlton Building,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion was mailed to PEARSON & JOSEFSBERG, 733 City National Bank Building, Miami, Florida 33130, ALAN R. SCHWARTZ, 66 West Flagler Street, Miami, Florida, Attorneys for Appellant, FRATES, FAY, FLOYD, & PEARSON, Attorneys for Distilled Spirits Wholesalers, Inc., 12th Floor Concord Building, Miami, Florida, and to SCOTT, McCARTHY, STEEL, HECTOR & DAVIS, Attorneys for Beer Industry of Florida, 14th Floor First National Bank Building, Miami, Florida 33131 this 6th day of March, 1969.

T. T. TURNBULL
Assistant Attorney General
State of Florida
State Capitol Building
Tallahassee, Florida

IN THE

SUPREME COURT OF THE UNITED STATES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

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MAYHUE'S SUPER LIQUOR STORES, INC.,
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DON MEIKLEJOHN, as Director,
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Appellees.

Appeal Pursuant to § 1253, Title 28, United States Code, from Three Judge Panel, United States District Court for the Southern District of Florida

---

Brief in Support of Appellees' Motion to Dismiss the Appeal or Affirm the Judgment Below Pursuant to Supreme Court Rule 16

STATEMENT OF THE CASE

The Plaintiff-Appellant, MAYHUE'S SUPER LIQUOR STORES, INC., will be referred to as Mayhue's or Plaintiff. The Defendant-Appellee, DON MEIKLEJOHN,

as Director of the Beverage Department of the State of Florida, will be referred to as the Director.

Mayhue's is a retail vendor of liquor, wine and beer. It instituted this action against the Director claiming that Sections 561.42 and 561.21 of the Florida Statutes are unconstitutional and seeking a temporary and permanent injunction against the Director from enforcing these laws. The sections under attack are generally known as the "Tied House Evil" Statutes, which prohibit a manufacturer or distributor of alcoholic beverages from having a financial interest in the business of a retailer of alcoholic beverages and forbid manufacturers or distributors from assisting retailers by any gift or loan of money or otherwise.

Mayhue's sought and obtained an order from the United States Court of Appeals from the Fifth Circuit empaneling a three-judge District Court to hear argument on Motions to Dismiss which had been filed by the Director and on behalf of Distilled Spirits Wholesalers, Inc. and Beer Industry of Florida as amicus curiae.

The case was dismissed by the three-judge court on the grounds that the allegations of the Complaint affirmatively showed that there was no substantial federal question presented for determination.

Mayhue's took simultaneous appeals to this Court and to the Court of Appeals for the Fifth Circuit. Proceedings in the latter have been stayed pending the outcome of this appeal.

I. MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

The jurisdiction of this Court on appeal is invoked pursuant to Title 28, U.S.C. § 1253. The threshhold question is therefore whether this Court rather than the Court of Appeals for the Fifth Circuit has jurisdiction to review the determination of the three-judge District Court below.

In recent years, this Court has frequently dealt with the question of its jurisdiction of a direct appeal under § 1253.

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 80 S.Ct. 568 (1960).

United States v. Georgia Public Service Commission, 371 U.S. 285, 9 L.Ed.2d 317, 83 S.Ct. 397 (1962).

Swift & Co. v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965).

Brotherhood of Locomotive Engineers, et al. v. Chicago, Rock Island & Pacific Railroad Co., et al., 382 U.S. 423, 15 L.Ed.2d 501, 86 S.Ct. 594 (1965).

Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967).

These cases make clear the following principles.

The question whether the Court has jurisdiction of this appeal depends upon whether this action was one re-

quired by § 2281 to be heard by a three-judge District Court. The question whether this case was one requiring three judges depends upon whether the Plaintiff's claim presented a substantial federal question. If Plaintiff's claim did not present a substantial constitutional issue, there was no basis for the convocation of a three-judge court. If Plaintiff's claim presented a substantial federal question, a three-judge court was required to adjudicate that question.

As stated by this Court in **Swift & Co. v. Wickham, supra,** it has long been held that no three-judge court is called for when the alleged constitutional claim is unsubstantial. In this case, the three judges held that Plaintiff's alleged constitutional claim was insubstantial and accordingly, dismissed Plaintiff's Complaint. The determination having been made that there was no substantial federal question before the three judges, there was no justification for the three-judge court and hence, there is no justification for direct appeal to this Court.

Moreover, it should be noted that the order appealed from is not "an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C., § 1253. It is clear that the judgment of a one-judge District Court dismissing an action to restrain enforcement of a state law because of the lack of a substantial federal question warranting the exercise of jurisdiction is not an order which would support a direct appeal to the United States Supreme Court under Title 28, U.S.C., §,1253. It is merely a final decision which will support an appeal to the Court of Appeals under 28 U.S.C., § 1291. **Stuart v. Wilson,** 282 F.2d 539 (5 Cir. 1960).

It is also clear that a three-judge court is not a different court from the District Court. It is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made. 28 U.S.C., § 2284(1); **Jacobs v. Tawes**, 250 F.2d 611 (4 Cir. 1957). Although this Court has not expressly considered this point in prior decisions, it is respectfully submitted that the language of § 1253 concerning the type of order entered should control whether a direct appeal under Title 28, U.S.C., § 1253 is proper.

> As stated in **Swift & Co. v. Wickham, supra,**:
> "[6,7] Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 USC § 2284(2) (1964 ed), thus preventing ex parte injunctions common previously. It provides for three judges, one of whom must be a circuit judge, 28 USC § 2284(1) (1964 ed), to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. **It authorizes direct review by this Court, 28 USC § 1253, as a means of accelerating a final determination on the merits**; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the circuit courts to the Supreme Court, and the consequent disruption of state tax and regulatory programs caused by

the outstanding injunction." (Emphasis Added). 15 L.Ed.2d at pages 200 and 201.

Contrary to the inference in Appellant's Brief on Jurisdictional Statement, the three-judge panel did not hold argument on nor did it purport to dismiss the Complaint on the merits. It simply found no basis for federal jurisdiction. Consequently, there is no reason for an accelerated determination on the merits by direct appeal.

II. MOTION TO AFFIRM THE ORDER OF DISMISSSAL

In argument before the three-judge court (R.81-157), counsel for Mayhue's conceded that its claim was based solely upon the equal protection clause of the United States Constitution (R.137).

Counsel for Mayhue's also conceded that as a retail vendor of liquor, wine and beer it was treated the same by the legislation under attack as everyone else within the class (R.137). It is the position of Mayhue's that it should be treated the same as retail vendors in other industries, i.e., retail vendors of clothing, food, and guns, etc., (R.137). The argument of Mayhue's was condensed by the Court below as the contention that it is "unreasonable to classify beer and wine retailers in a way in which they cannot obtain the credit as compared with a shoe store retailer or a clothing retailer, or anyone else who can go out and get credit." (R.139). In addition to this position, Mayhue's contends that it is an unreasonable classification to place different credit restrictions upon a retail vendor as opposed to the manufacturer, wholesaler or distributor in the liquor business (R.140). It has

been conceded by Mayhue's that there is no authority to support their position (Jurisdictional Statement, p. 6) and it was so recognized by the Court below (R.142).

In its brief on Jurisdictional Statement, Mayhue's relies upon **Smith v. Cahoon,** 283 U.S. 553 (1930) and **Morey v. Doud,** 354 U.S. 457, IL.Ed.2d 1485, 77 S.Ct. 1344 (1957). Each of the cited cases is inapposite. In **Morey,** the court held that there had been a violation of the equal protection clause, wherein the Illinois Community Currency Exchanges Act excepted money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the State of Illinois must secure a license and submit to state regulations. In other words, an obvious exception was made as to the American Express Company as opposed to all other firms engaged in the selling or issuing of money orders. In the present case as previously noted, Mayhue's is treated exactly the same as all other retail liquor vendors. The same distinction is noted in **Cahoon** wherein the court struck down a Florida statute imposing various regulations and restrictions on carriers without regard to whether said carriers were purely private carriers or common carriers. The court reasoned that it was lawful for the State of Florida to regulate all common carriers in the same manner, but that the Florida legislature could not indiscriminately expand this regulation to apply to a private carrier without some rational basis for doing so. It is apparent from this holding of the court that there is no constitutional infirmity in a statute that applies equally to all members of a recognized class, i.e., the retail liquor vendors in the instant case.

The Florida statutes under attack in the present case were held constitutional by the Florida Supreme Court in the case of **Pickerill v. Schott,** Fla. 1951, 55 So.2d 716, and in a Florida Appellate decision of **Overstreet v. Lee,** 1st D.C.A. 1963, 152 So.2d 201. Other states have upheld the constitutionality of similar legislation. **Tom and Jerry Inc. v. Nebraska Liquor Control Commission,** Neb. 1968, 183 Neb. 410, 160 N.W.2d 232; **Fowler v. Harris,** Md.App. 1938, 200 A. 825 and cases cited therein.

Where the issue of the constitutionality of a state statute has been squarely heard and determined by the courts of that state, it is appropriate for this Court to affirm. **Arizona Publishing Co. v. O'Neil, et al.,** 22 F.Supp. 117 (D.C. Ariz. 1938) aff'd 304 U.S. 543, 82 L.Ed. 1518, 58 S.Ct. 950. More particularly, Mayhue's position that it has asserted a substantial federal question is itself so unsubstantial as not to require further argument.

CONCLUSION

For the foregoing reasons the Motion to Dismiss the Appeal, or in the alternative the Motion to Affirm the Order of Dismissal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Support of Appellees' Motion to Dismiss Appeal or Affirm the Judgment was mailed to PEARSON & JOSEFSBERG, 733 City National Bank Building, Miami, Florida 33130, ALAN R. SCHWARTZ, 66 West Flagler Street, Miami, Florida, Attorneys for Appellant FRATES, FAY, FLOYD & PEARSON, Attorneys for Distilled Spirits Wholesalers, Inc., 12th Floor Concord Building, Miami, Florida, and to SCOTT McCARTHY STEEL HECTOR & DAVIS, Attorneys for Beer Industry of Florida, 14th Floor First National Bank Building, Miami, Florida 33131 this 6th day of March, 1969.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MAYHUE'S SUPER LIQUOR STORES, INC. *v.* MEIKLEJOHN, DIRECTOR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 904. Decided March 24, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.